

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

IN RE: ASBESTOS LITIGATION	)	
	)	
<b>HUDSON TRIAL GROUP</b>	)	
	)	
Harry J. Hudson	)	C.A. NO. 03C-06-130

Date Submitted: September 12, 2006  
Date Decided: December 22, 2006  
Date Amended: January 11, 2007

**MEMORANDUM OPINION**

*Upon Consideration of Defendant, Delmarva Power & Light Company's  
Motion for Summary Judgment.*

**GRANTED IN PART and DENIED IN PART**

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**SLIGHTS, J.**

## I.

In this opinion, the Court considers whether Defendant, Delmarva Power and Light (“DP&L”), is liable for the asbestos related injuries allegedly suffered by Plaintiff, Harry Hudson (“Hudson”), while working as a contractor at two separate DP&L facilities. DP&L’s motion for summary judgment requires the Court to determine whether DP&L exercised the requisite degree of control over Hudson’s work at its two plants such that it should be subjected to liability. Upon consideration of the parties’ written submissions and oral argument, DP&L’s motion for summary judgment with respect to Hudson’s work at the DP&L Edgemoor plant is **GRANTED**. Based on the undisputed facts of record, it is clear that DP&L did not control Hudson’s work at that facility as a matter of law. DP&L’s motion for summary judgment as it relates to Hudson’s work at the DP&L Delaware City plant is **DENIED**. The record with respect to Hudson’s work at the Delaware City plant is not sufficiently developed to allow the Court to make a dispositive determination of the control issue.

## II.

Hudson manufactured and installed machine parts as an employee of WSMW Industries Inc. (“WSMW”) from 1976-2001.<sup>1</sup> His job as a machinist required him

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<sup>1</sup>Transaction Identification Number, (“T.I.”), 11115989 at A-1-A-2.

“frequently [to] cut and install[] asbestos-containing sheet gasket and rope packing material” as well as work near other contractors working with asbestos containing insulation.<sup>2</sup> He was diagnosed with mesothelioma, a cancer linked to asbestos exposure, after he left WSMW.<sup>3</sup>

Hudson worked for WSMW at many different sites owned by many different entities. At issue in this motion are two DP&L facilities - Edgemoor and Delaware City.<sup>4</sup> He worked at the Edgemoor site “at least 50, 75 times”<sup>5</sup> and the Delaware City site “a good hundred times.”<sup>6</sup>

#### **A. Hudson’s Work at DP&L Edgemoor**

While at the Edgemoor plant in the 1980's, Hudson’s coworker, Martin Haugh (“Haugh”), described Hudson’s work fixing broken turbines:

“[Hudson] was realigning these [turbines], skinning, putting new skin back inside these turbines, running them in, and taking stuff off it and putting things back in – putting metal back into them from where the turbines have scraped or putting metal back into it that had to be taken out and skinned, the skin taken off and putting things back in, putting

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<sup>2</sup>*Id.* at A-2.

<sup>3</sup>*Id.* at A-6.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.* at A-19-A-20.

<sup>6</sup>*Id.* at A-20.

metal back in.”<sup>7</sup>

Hudson removed asbestos insulation from the turbines.<sup>8</sup> At deposition, Hudson explained how he was exposed to asbestos during this process at the Edgemoor facility: “[w]hen you tear it out, there’s dust all over the place. There’s insulation being removed from the floor, loaded on the trucks, put in the dumpsters.”<sup>9</sup> WSMW usually hired an insulation firm to reapply non-asbestos insulation to the repaired turbines, but Haugh was not sure if WSMW did so at the Edgemoor site.<sup>10</sup>

Haugh testified that DP&L had authority over “everything” involving the work of WSMW employees at the Edgemoor site.<sup>11</sup> Haugh described a chain of command whereby WSMW employees reported first to their foreman who, in turn, reported to

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<sup>7</sup> T.I. 11115989 at A-29-A-30. Mr. Haugh’s testimony concerning Hudson’s work at DP&L relates only to his work at the Edgemoor facility. *See id.* at A-24 (Haugh averred “I worked with Harry Hudson at the DP&L facility in Edgemoor, Delaware and at the Allied Chemical facility in Claymont, Delaware[.]”).

<sup>8</sup> *Id.* at A-31.

<sup>9</sup> *Id.* at A-13. In addition to asbestos exposure in connection with his machinist work, Hudson also was exposed to asbestos when he worked near the insulation work performed by another independent contractor, County Insulation. *Id.* at A-2. It is unclear from his affidavit whether Hudson’s exposure from County Insulation’s work occurred at a DP&L work site. *See id.* (“I recall County Insulation as a contractor who performed installation and removal of insulation materials at several sites I worked at for WSMW.”).

<sup>10</sup> *Id.* at A-32-A-33.

<sup>11</sup> *Id.* at A-42.

the DP&L project manager for the WSMW job, if necessary.<sup>12</sup> According to Haugh, the DP&L project manager oversaw how the WSMW employees “did the job, how they performed the job, and how you looked.”<sup>13</sup> The DP&L project manager could remove someone from the job and could impose safety requirements.<sup>14</sup> Nevertheless, if a problem arose on the job site, Haugh testified he “always had the resource of [his] foreman.”<sup>15</sup> Haugh never saw a DP&L person directly reprimand a WSMW employee when discipline was required.<sup>16</sup> Instead, the WSMW foreman would directly discipline WSMW employees when needed.<sup>17</sup> Additionally, Haugh testified that WSMW paid him and Hudson directly, kept track of their work hours, and supplied them with tools and equipment.<sup>18</sup> Haugh’s WSMW foreman also told him how to do his job, but Haugh did not know if Hudson’s WSMW foreman did the same.<sup>19</sup>

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<sup>12</sup>*Id.* at A-41.

<sup>13</sup> *Id.* at A-42.

<sup>14</sup>*Id.*

<sup>15</sup>T.I. 11115989 at A-36-A-37.

<sup>16</sup> *Id.* at A-48.

<sup>17</sup> *Id.* at A-37

<sup>18</sup> T.I. 11115989 at A-36.

<sup>19</sup> *Id.*

## **B. Hudson's work at DP&L Delaware City**

There are a just a handful of definitive references to Hudson's work at the Delaware City plant in the record: (1) Hudson testified at his deposition that he worked at the Delaware City plant "a good hundred times;"<sup>20</sup> (2) Hudson testified in his deposition that he could not remember seeing another contractor at the plant;<sup>21</sup> (3) Hudson's affidavit includes the Delaware City Plant in a list of sites where he worked while employed by WSMW; and (4) Hudson's Answers to Interrogatories includes the Delaware City plant in a list of sites where he worked while employed by WSMW.<sup>22</sup> The remainder of Hudson's testimony and the other evidence of record focuses on his work at the Edgemoor facility and other plants not owned by DP&L.

## **III.**

DP&L argues that summary judgment is appropriate because Hudson has failed to establish that DP&L exercised the requisite degree of control over Hudson's work at either of the two DP&L plants where he worked.<sup>23</sup> Hudson opposes DP&L's motion for summary judgment because he contends, at the very least, genuine issues

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<sup>20</sup>*Id.* at A-20.

<sup>21</sup> *Id.*

<sup>22</sup>*Id.* at A-1-A-2.

<sup>23</sup> T.I. 6537758 at 2.

of material fact appear in the record with respect to the degree to which DP&L actively controlled his work.<sup>24</sup> The issue, then, as framed by the parties, is whether the record contains sufficient facts upon which a reasonable fact finder could conclude that DP&L “controlled” Hudson’s work at the DP&L facilities such that DP&L might be held liable in tort for Hudson’s work-related injuries.<sup>25</sup>

#### IV.

The Court’s principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist.<sup>26</sup> Summary judgment will be granted if, after viewing the record in a light most favorable to a non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.<sup>27</sup> If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record

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<sup>24</sup> T.I. 11115989 at 3.

<sup>25</sup>The plaintiff has not argued that DP&L should be held liable on a theory other than workplace control, DP&L has not addressed any other theories of liability in its motion, and the Court has not, therefore, considered any other theories of liability in this opinion. *Accord Roca v. E.I. DuPont de Nemours & Co.*, 842 A.2d 1238 (Del. 2004)(recognizing that the parties to litigation should identify specifically the legal grounds upon which they rely to support their respective positions so that the court can properly address them).

<sup>26</sup> *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973).

<sup>27</sup> *Id.*

*sub judice*, then summary judgment will not be granted.<sup>28</sup>

The moving party bears the initial burden of demonstrating that the undisputed facts support his legal claims.<sup>29</sup> If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder or that the legal theories raised in support of the motion are deficient.<sup>30</sup> As stated, when reviewing the record, the Court must view the evidence in the light most favorable to the non-moving party.<sup>31</sup>

## V.

DP&L's potential liability to Hudson depends, as a predicate matter, on whether DP&L owed Hudson a duty of care. The general rule of landowner liability is that "neither an owner nor general contractor has a duty to protect an independent contractor's employee from hazards created by the doing of the contract work or the

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<sup>28</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). *See also Cook v. City of Harrington*, 1990 WL 35244, at \*3 (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").

<sup>29</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

<sup>30</sup> *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

<sup>31</sup> *See United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Brzoska*, 668 A.2d at 1364.



condition of the premises or the manner in which the work is performed[.]”<sup>32</sup> The Supreme Court of Delaware has recognized three exceptions to this rule -- liability may be imposed when the landowner or general contractor: “(1) exercises active control over the manner and method of the independent contractor’s work, (2) voluntarily assumes responsibility for safety, or (3) maintains possessory control over the work area during the work.”<sup>33</sup> The Court will not address the latter two theories of landowner liability because Hudson has raised only the first - - active control - - as the source of DP&L’s liability for his asbestos related injuries.<sup>34</sup>

While there is no bright line test, it is clear that active control does not exist merely because the owner or general contractor maintains “general superintendence” over the work to ensure that it complies with the contract specifications.<sup>35</sup> There must be discernable control over the manner and method of the performance of the contract

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<sup>32</sup> *O’Connor v. Diamond State Tel. Co.*, 503 A.2d 661, 663 (Del. Super. Ct. 1985). *See also* Restatement (Second) Torts § 409 (2001).

<sup>33</sup> *Handler Corp. v. Tlapechco*, 901 A.2d 737, 740-41 (Del. 2006).

<sup>34</sup> T.I. 11149148 at 2.

<sup>35</sup> *Seeney v. Dover Country Club Apartments*, 318 A.2d 619, 621 (Del. Super. Ct. 1974). *See also Handler*, 901 A.2d at 745 (“There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.”).

work such that “the contractor is not entirely free to do the work in his own way.”<sup>36</sup>

Relying upon the Restatement (Second) of Torts, the Supreme Court of Delaware further refined the analysis by holding that “[i]t is not enough that he [the landowner or general contractor] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendation which need not necessarily be followed, or to prescribe alterations and decisions.”<sup>37</sup> Applying this guidance, this court has found that a general contractor actively controlled a subcontractor because it was “working on” a policy to protect all workers from falling on a construction site for four years prior to plaintiff’s injury, its supervisor was present on the job site and spoke with the subcontractor at the work place, and the general contractor supplied tools and materials to the subcontractor.<sup>38</sup> Conversely, a landowner acting as general contractor did not actively control the work of an independent contractor even though it

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<sup>36</sup> *Handler*, 901 A.2d at 745. See also *Cook v. E.I. Dupont De Nemours and Co.*, 2003 WL 21246544, at \*3 (Del. Super. Ct. May 30, 2003) (quoting *In re Asbestos Litigation (Roca)*, 2002 WL 31007993, at \*3 (Del. Super. Ct. 2002)) (“the evidence has to show that the employer actually controlled the details or the methods of work.”).

<sup>37</sup> *Handler*, 901 A.2d at 745 (quoting Restatement (Second) of Torts § 414 cmt. c (1965)). See also Restatement (Second) of Torts § 414 (“One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.”).

<sup>38</sup> See *Hawthorne v. EDIS Co.*, 2003 WL 23009354, at \*9 (Del. Super. Ct. July 14, 2003).

instituted safety guidelines, inspected the contractor's work and submitted change orders.<sup>39</sup>

In the asbestos litigation context, this court has rejected a plaintiff's contention of active control by a landowner who allegedly controlled the plaintiff's work by issuing safety manuals and some tools, scheduling the work, restricting the plaintiff's access to certain areas at the work site and sometimes having a supervisor present.<sup>40</sup> The court found that these measures were merely an exercise of "general superintendence" rather than active control because the plaintiff could perform work as he chose while the defendant landowner only took steps to ensure that the quality of the work was up to specifications.<sup>41</sup>

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<sup>39</sup> See *Murson v. The Henry Francis Dupont Winterthur Museum, Inc.*, 2001 WL 898590, at \*1-2 (Del. Aug. 3, 2001). See also *Cook*, 2001 WL 1482685, at \*4 (finding defendant landowner did not exercise active control over plaintiff's work despite plaintiff's reliance on the defendant landowner's security policies, such as, requiring that all workers go through a security gate, wear safety equipment, smoke and eat in areas designated areas and drive within the speed limit).

<sup>40</sup> *In re: Asbestos Litigation (Wooleyhan)*, Tr. Mot. Summ. J., C.A. No. 00C-08-028 ASB, C.A. No. 01C-06-151, C.A. No. 01C-11-239, C.A. No. 02C-3-194, C.A. No. 01C-10-240, C.A. No. 01C-10-173, C.A. No. 02C-01-041, Babiarz, J. (Del. Super. Ct. February 15, 2005), *rev'd on other grounds*, *In re Asbestos Litig. (Wooleyhan)*, 897 A.2d 767 (Del. 2006).

<sup>41</sup> *Id.* See also *In re Asbestos Litigation - Lukowski Trial Group*, C.A. No. 87C-JN-84, 87C-Se-1, Conaway, M. (Del. Super. Ct. Aug. 25, 1992) (Report) (finding defendant landowner did not control plaintiff's work while he was exposed to asbestos even though defendant directed the work, placed safety workers at the job site, required plaintiff to follow safety and security procedures, and ultimately approved plaintiff's work); *Kotowski, et al. v. A.C.&S., Inc., et al.*, C.A. No. 86C-JN-50, Carr, M. (Del. Super. Ct. May 17, 1990) (Report) (finding defendant landowner did not exercise control over plaintiffs' work during asbestos exposure despite evidence that defendant dictated where and how to install insulation, required plaintiffs to check in and out of the work site, and controlled safety and security at the job sites).

A summary of the extensive case law on the subject reveals a broad, but not exhaustive, list of factors the court might consider to determine the presence of active control, including: (1) who provided the plaintiff with the tools and equipment to perform the work;<sup>42</sup> (2) who had the authority to hire, fire, or discipline the plaintiff;<sup>43</sup> (3) who did plaintiff approach to address workplace concerns;<sup>44</sup> (4) who controlled the operations at the work site;<sup>45</sup> (5) who directed the plaintiff's work;<sup>46</sup> and (6) whether the landowner was "in a position of authority to provide a safe workplace for all trades."<sup>47</sup>

#### **A. DP&L Edgemoor**

The record demonstrates that DP&L exercised general superintendence, not active control, over Hudson's work at the Edgemoor facility. WSMW provided its

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<sup>42</sup> See *Bryant v. Delmarva Power & Light Co.*, 1995 WL 653987, at \*4 (Del. Super. Ct. Oct. 2, 1995); *O'Connor*, 503 A.2d at 663; *Rabar v. E.I. Du Pont De Nemours and Co., Inc.*, 415 A.2d 499, 507 (Del. Super. Ct. 1980), *rev'd sub nom. on other grounds*, *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084 (Del. Super. Ct. 1994).

<sup>43</sup> *Bryant*, 1995 WL 653987, at \*4; *Rabar*, 415 A.2d at 504-505; *Seeney*, 318 A.2d at 622.

<sup>44</sup> *Bryant*, 1995 WL 653987, at \*4; *Rabar*, 415 A.2d at 507.

<sup>45</sup> See *Murson*, 782 A.2d at 266; *Hawthorne*, 2003 WL 23009254, at \* 9; *Cook*, 2003 WL 21246544, at \*3; *Bryant*, 1995 WL 653987, at \*4; *Farrall v. A.C. & S. Co., Inc.*, 1988 WL 55309, at \*1 (Del. Super. Ct. May 11, 1988); *O'Connor*, 503 A.2d at 664; *Rabar*, 415 A.2d at 507.

<sup>46</sup> *Cook*, 2003 WL 21246544, at \*3; *Murson*, 782 A.2d at 266; *Bryant*, 1995 WL 653987, at \*4; *Rabar*, 415 A.2d at 507.

<sup>47</sup> *Hawthorne*, 2003 WL 23009254, at \* 9.

employees with the tools and equipment to perform the work.<sup>48</sup> WSMW had the authority to hire, fire and discipline its employees. Specifically, Haugh testified that WSMW paid him and Hudson directly, monitored their hours and that the WSMW foreman managed and disciplined the WSMW employees.<sup>49</sup> WSMW employees went to the WSMW foreman, not the DP&L project manager, to address workplace concerns and receive guidance on how they were to perform the job at hand.<sup>50</sup> Despite Haugh's testimony that DP&L controlled how the WSMW employees "did the job, how they performed the job, and how [WSMW employees] looked," his specific description of the work place environment reveals that DP&L merely exercised general superintendence to implement safety regulations and ensure that all employees conducted themselves accordingly.<sup>51</sup> Indeed, what Haugh described of DP&L's implementation of safety regulations and general supervision at the Edgemoor facility is not nearly as compelling as the evidence of "active control" this court regularly has found to fall short of the mark needed to establish landowner liability.<sup>52</sup> There is no evidence that DP&L issued safety manuals or tools to WSMW

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<sup>48</sup>T.I. 11115989 at A-36.

<sup>49</sup>*Id.* at A-36-A-37.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at A-41-A-42.

<sup>52</sup>*See supra* n.41.

employees, scheduled Hudson's work, or restricted his access to certain areas at the work site. Thus, it is clear from the record that, when all was said and done at the Edgemoor site, Hudson was "free to do the work in his own way."<sup>53</sup>

## **B. DP&L Delaware City**

The record is unclear as to the degree of control DP&L exercised over Hudson's work at the Delaware City plant. Haugh's testimony only addresses Hudson's work, and DP&L's level of control over his work, at the Edgemoor plant; he did not work with Hudson at the Delaware City plant.<sup>54</sup> The only evidence, therefore, of control DP&L may have exercised over Hudson's work at the Delaware City facility is found in Hudson's affidavit and deposition. There, Hudson makes a total of four brief references to his work at the Delaware City plant.<sup>55</sup> Indeed, the extensive inquiry into Hudson's work at the Edgemoor facility and the lack of any meaningful inquiry into Hudson's work at the Delaware City facility marks a contrast that is significant to the summary judgment analysis. DP&L has not sustained its initial burden on summary judgment to demonstrate that the undisputed facts of record support its legal argument that it owed no duty to Hudson at the Delaware City

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<sup>53</sup>*Handler*, 901 A.2d at 745.

<sup>54</sup> See T.I. 11115989 at A-24; A-36.

<sup>55</sup>See *supra* n.20-24.

plant because neither party developed the factual record that would be required to support their respective positions on the control issue. For instance, there is no evidence in the record regarding the “chain of command” at the Delaware City plant, no evidence of how Hudson was paid for his work there, who supplied the tools for his work there, or who was in charge of safety supervision at the site. DP&L cannot rely upon the evidence of the work environment at Edgemoor to establish the environment at Delaware City in the absence of undisputed evidence that DP&L managed its contractors at each of its facilities in the same manner. No such evidence exists in this case. Accordingly, the Court is satisfied that a more thorough development of the record is needed before the Court can meaningfully apply the law to the facts relating to Hudson’s work in Delaware City.<sup>56</sup>

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<sup>56</sup> See *Ebersole*, 180 A.2d at 470. The Court notes that this case is distinguishable from *In Re Asbestos Litigation, Keeler*, C.A. No. 90C-04-84, Gebelein, J. (Del. Super. Ct. Nov. 2, 1994), where the Court granted summary judgment after counsel for the moving defendant “certified to [the] Court that, after reviewing the pleadings, answers to interrogatories and depositions, plaintiffs had not stated any facts establishing that DP&L exercised control over the work site or plaintiff.” *Keeler*, Mem. Op. at 5. Plaintiff did not meaningfully respond to counsel’s certification and the court granted the motion. *Id.* at 8. No such certification has been supplied to the Court in this case with respect to the Delaware City site. Rather, as best as the Court can discern, DP&L focused its attention and argument on Edgemoor and lost sight in its argument of the fact that Hudson worked at another DP&L location. DP&L’s argument simply ignored Hudson’s work at Delaware City. To cure this gap in the record, DP&L’s counsel may supply the certification it supplied in *Keeler* in this case as a means to develop the record further. Hudson may then respond, if he wishes. The Court can then determine if the record has been adequately developed to allow summary disposition of the claim.

## VI.

Based on the foregoing, the Court finds that DP&L did not exercise the requisite degree of control over Hudson's work at its Edgemoor facility to subject DP&L to landowner liability. DP&L is entitled to summary judgment on that basis. Summary judgment is not appropriate, however, with respect to DP&L's potential liability for Hudson's asbestos exposure at the Delaware City plant because the record has not been adequately developed to facilitate an analysis of the control issue as it relates to Hudson's work there. Accordingly, DP&L's motion for summary judgment is **GRANTED in Part and DENIED in Part**.

**IT IS SO ORDERED.**

/s/ Joseph R. Slights, III  
Judge Joseph R. Slights, III

Original to Prothonotary